

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 24, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JARRID M.,¹

Plaintiff,

vs.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 1:19-cv-03057-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 15, 16

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names.

Additionally, Plaintiff is transgender and as such, female pronouns are used in this order.

² Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

ORDER - 1

1 Before the Court are the parties' cross-motions for summary judgment. ECF
2 Nos. 15, 16. The parties consented to proceed before a magistrate judge. ECF No.
3 8. The Court, having reviewed the administrative record and the parties' briefing,
4 is fully informed. For the reasons discussed below, the Court grants Plaintiff's
5 motion, ECF No. 15, and denies Defendant's motion, ECF No. 16.

6 JURISDICTION

7 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

8 STANDARD OF REVIEW

9 A district court's review of a final decision of the Commissioner of Social
10 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
11 limited; the Commissioner's decision will be disturbed "only if it is not supported
12 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
13 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
14 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
15 (quotation and citation omitted). Stated differently, substantial evidence equates to
16 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
17 citation omitted). In determining whether the standard has been satisfied, a
18 reviewing court must consider the entire record as a whole rather than searching
19 for supporting evidence in isolation. *Id.*

1 In reviewing a denial of benefits, a district court may not substitute its
2 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
3 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
4 rational interpretation, [the court] must uphold the ALJ’s findings if they are
5 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
6 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
7 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
8 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
9 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
10 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
11 *Sanders*, 556 U.S. 396, 409-10 (2009).

12 **FIVE-STEP EVALUATION PROCESS**

13 A claimant must satisfy two conditions to be considered “disabled” within
14 the meaning of the Social Security Act. First, the claimant must be “unable to
15 engage in any substantial gainful activity by reason of any medically determinable
16 physical or mental impairment which can be expected to result in death or which
17 has lasted or can be expected to last for a continuous period of not less than twelve
18 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
19 “of such severity that he is not only unable to do his previous work[,] but cannot,
20 considering his age, education, and work experience, engage in any other kind of

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §
2 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
5 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
6 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
7 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
8 C.F.R. § 416.920(b).

9 If the claimant is not engaged in substantial gainful activity, the analysis
10 proceeds to step two. At this step, the Commissioner considers the severity of the
11 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
12 “any impairment or combination of impairments which significantly limits [his or
13 her] physical or mental ability to do basic work activities,” the analysis proceeds to
14 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
15 this severity threshold, however, the Commissioner must find that the claimant is
16 not disabled. 20 C.F.R. § 416.920(c).

17 At step three, the Commissioner compares the claimant’s impairment to
18 severe impairments recognized by the Commissioner to be so severe as to preclude
19 a person from engaging in substantial gainful activity. 20 C.F.R. §
20 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the

1 enumerated impairments, the Commissioner must find the claimant disabled and
2 award benefits. 20 C.F.R. § 416.920(d).

3 If the severity of the claimant's impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant's "residual functional capacity." Residual functional capacity (RFC),
6 defined generally as the claimant's ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
8 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

9 At step four, the Commissioner considers whether, in view of the claimant's
10 RFC, the claimant is capable of performing work that he or she has performed in
11 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
12 capable of performing past relevant work, the Commissioner must find that the
13 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
14 performing such work, the analysis proceeds to step five.

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
18 must also consider vocational factors such as the claimant's age, education and
19 past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of
20 adjusting to other work, the Commissioner must find that the claimant is not

1 disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to
2 other work, analysis concludes with a finding that the claimant is disabled and is
3 therefore entitled to benefits. *Id.*

4 The claimant bears the burden of proof at steps one through four above.
5 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
6 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
7 capable of performing other work; and (2) such work “exists in significant
8 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
9 700 F.3d 386, 389 (9th Cir. 2012).

10 **ALJ’S FINDINGS**

11 On March 6, 2015, Plaintiff applied for Title XVI supplemental security
12 income benefits alleging an amended disability onset date of March 6, 2015. Tr.
13 47, 155-60. The application was denied initially, Tr. 89-93, and on
14 reconsideration, Tr. 97-100. Plaintiff appeared before an administrative law judge
15 (ALJ) on April 16, 2018. Tr. 41-65. On May 22, 2018, the ALJ denied Plaintiff’s
16 claim. Tr. 12- 31.

17 At step one of the sequential evaluation process, the ALJ found Plaintiff has
18 not engaged in substantial gainful activity since March 6, 2015. Tr. 17. At step
19 two, the ALJ found that Plaintiff has the following severe impairments: major
20

1 depressive disorder, gender identity disorder, generalized anxiety disorder,
2 posttraumatic stress disorder, and dysthymic disorder. *Id.*

3 At step three, the ALJ found Plaintiff does not have an impairment or
4 combination of impairments that meets or medically equals the severity of a listed
5 impairment. Tr. 18-20. The ALJ then concluded that Plaintiff has the RFC to
6 perform a full range of work at all exertional levels but with the following
7 limitations:

8 [Plaintiff] is able to understand, remember, and carry out short,
9 simple, routine, and repetitive tasks. She can perform work in which
10 contact with the general public is not an essential element of any task;
11 however, incidental and superficial contact is not precluded.

12 [Plaintiff] is able to adapt to simple changes and can perform tasks
13 with simple goals predetermined by the employer.

14 Tr. 20.

15 At step four, the ALJ found Plaintiff has no past relevant work. Tr. 26. At
16 step five, the ALJ found that, considering Plaintiff's age, education, work
17 experience, RFC, and testimony from the vocational expert, there were jobs that
18 existed in significant numbers in the national economy that Plaintiff could perform,
19 such as janitor-night cleaner, packager, electrical accessories assembler, and
20 buffing machine tender. *Id.* Therefore, the ALJ concluded Plaintiff was not under
a disability, as defined in the Social Security Act, from the date of the application
through the date of the decision. Tr. 27.

1 On February 1, 2019, the Appeals Council denied review of the ALJ's
2 decision, Tr. 1-5, making the ALJ's decision the Commissioner's final decision for
3 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 her supplemental security income benefits under Title XVI of the Social Security
7 Act. Plaintiff raises the following issues for review:

- 8 1. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 9 2. Whether the ALJ properly evaluated the medical opinion evidence;
- 10 3. Whether the ALJ conducted a proper step-two; and
- 11 4. Whether the ALJ conducted a proper step-three analysis.

12 ECF No. 15 at 2.

13 DISCUSSION

14 A. Plaintiff's Symptom Claims

15 Plaintiff faults the ALJ for failing to rely on clear and convincing reasons in
16 discrediting her symptom claims. ECF No. 15 at 18-21. An ALJ engages in a two-
17 step analysis to determine whether to discount a claimant's testimony regarding
18 subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2. "First, the ALJ must
19 determine whether there is objective medical evidence of an underlying
20 impairment which could reasonably be expected to produce the pain or other

1 symptoms alleged.” *Molina*, 674 F.3d at 1112 (quotation marks omitted). “The
2 claimant is not required to show that [the claimant’s] impairment could reasonably
3 be expected to cause the severity of the symptom [the claimant] has alleged; [the
4 claimant] need only show that it could reasonably have caused some degree of the
5 symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

6 Second, “[i]f the claimant meets the first test and there is no evidence of
7 malingering, the ALJ can only reject the claimant’s testimony about the severity of
8 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
9 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
10 omitted). General findings are insufficient; rather, the ALJ must identify what
11 symptom claims are being discounted and what evidence undermines these claims.
12 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas*, 278 F.3d
13 at 958 (requiring the ALJ to sufficiently explain why it discounted claimant’s
14 symptom claims)). “The clear and convincing [evidence] standard is the most
15 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,
16 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
17 924 (9th Cir. 2002)).

18 Factors to be considered in evaluating the intensity, persistence, and limiting
19 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
20 duration, frequency, and intensity of pain or other symptoms; 3) factors that

1 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
2 side effects of any medication an individual takes or has taken to alleviate pain or
3 other symptoms; 5) treatment, other than medication, an individual receives or has
4 received for relief of pain or other symptoms; 6) any measures other than treatment
5 an individual uses or has used to relieve pain or other symptoms; and 7) any other
6 factors concerning an individual's functional limitations and restrictions due to
7 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
8 416.929 (c). The ALJ is instructed to "consider all of the evidence in an
9 individual's record," "to determine how symptoms limit ability to perform work-
10 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

11 The ALJ found that Plaintiff's medically determinable impairments could
12 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
13 statements concerning the intensity, persistence, and limiting effects of her
14 symptoms were not entirely consistent with the evidence. Tr. 21.

15 *1. Inconsistent Statements*

16 The ALJ found Plaintiff's allegations were inconsistent with her statements
17 to providers. Tr. 21-22 (citing Tr. 247, 274, 278, 280). In evaluating a claimant's
18 symptom claims, an ALJ may consider the consistency of an individual's own
19 statements made in connection with the disability-review process with any other
20

1 existing statements or conduct under other circumstances. *Smolen v. Chater*, 80
2 F.3d 1273, 1284 (9th Cir. 1996).

3 The ALJ observed that Plaintiff denied experiencing psychiatric symptoms
4 or denied having symptoms of depression and anxiety and noted that Plaintiff only
5 began reporting significant symptoms of depression and anxiety to providers after
6 she applied for disability. Tr. 21-22. The first record cited by the ALJ is a visit for
7 rectal bleeding, in which Plaintiff denied psychiatric symptoms. Tr. 247. In the
8 next records, while Plaintiff denied depression and anxiety at the cited visits, she
9 reported her mother wanted her to re-engage in therapy and she was assessed with
10 anxiety. Tr. 274, 278, 280, 284. As discussed more fully below, the Court finds
11 the ALJ's selective citation of the record as to Plaintiff's mental health symptoms
12 is not supported by substantial evidence.

13 Plaintiff has alleged no improvement in her symptoms with medication, Tr.
14 57-58, which the ALJ found inconsistent with the evidence, Tr. 22. While Plaintiff
15 reported some improvement with Buspar, Tr. 371, 406, she stopped taking it and
16 had difficulties getting it, Tr. 367, 395. Plaintiff described the improvement on
17 Buspar as slightly decreasing her anxiety and irritability at one visit, Tr. 386, but
18 stated it was helping "okay", Tr. 461, and was "still helpful", Tr. 454, at other
19 visits. Plaintiff reported Remeron helped only "a bit." Tr. 433. The record as a
20 whole does not demonstrate that Plaintiff stated her symptoms were ever more than

1 minimally improved by medication. As such, this reasoning is not a clear and
2 convincing reason to reject Plaintiff's statements.

3 *2. Inconsistent Objective Evidence*

4 The ALJ found Plaintiff's allegations inconsistent with the objective
5 evidence, including minimal observations of psychiatric difficulties and Plaintiff's
6 performance on mental status exams (MSEs). Tr. 22-23. An ALJ may not
7 discredit a claimant's symptom testimony and deny benefits solely because the
8 degree of the symptoms alleged is not supported by objective medical evidence.
9 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947
10 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir.
11 1989); *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). However, the
12 objective medical evidence is a relevant factor, along with the medical source's
13 information about the claimant's pain or other symptoms, in determining the
14 severity of a claimant's symptoms and their disabling effects. *Rollins*, 261 F.3d at
15 857; 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2). MSEs are objective measures of
16 an individual's mental health. *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir.
17 2017).

18 Here, the ALJ found there were minimal observations of psychological
19 difficulties. Tr. 22 (citing Tr. 247 (no psychiatric symptoms reported at a visit for
20 rectal bleeding); Tr. 275, 279, 281, 285, 313 (normal MSEs at hormone therapy

1 appointments); Tr. 289 (flat affect, symptoms consistent with major depression);
2 Tr. 304 (increased psychomotor activity, flat affect, depressed, uneasy,
3 hallucinations per history, soft speech); Tr. 332 (flat affect, depressed, uneasy, fair
4 attention); Tr. 338 (flat affect and shy); Tr. 348 (depressed mood); Tr. 368 (okay
5 mood with congruent, dysphoric affect); Tr. 381 (appeared somewhat anxious, did
6 not make much eye contact); Tr. 382 (appeared anxious, fidgeting); Tr. 384
7 (appeared anxious, made very limited eye contact); Tr. 392 (quiet and tearful for
8 much of the appointment, cried silently at times); Tr. 394 (appeared anxious, had a
9 difficult time making eye contact, picked at her pants); Tr. 396 (mood “not as
10 good”, affect congruent and dysphoric, trace anxious); Tr. 408 (better mood,
11 congruent, euthymic affect, trace anxious); Tr. 413 (better mood, congruent,
12 neutral affect); Tr. 456 (“not so good” mood, depressed/restricted affect, poor eye
13 contact, fair to poor insight/judgment); Tr. 460 (moderate mood, some eye
14 contact); Tr. 462 (guarded but cooperative, “okay” mood, neutral affect,
15 insight/judgment fair, improving)).

16 However, the ALJ’s discussion of the mental health medical evidence
17 largely omits significant mental health symptoms. The ALJ’s discussion of the
18 cited records only discusses “minimal” symptoms, and some symptoms such as
19 flat, anxious, or depressed affect. Tr. 21. The ALJ stated the absence of Plaintiff
20 presenting with “serious psychiatric symptoms” is inconsistent with Plaintiff’s

1 allegations. Tr. 22. Yet, the cited records include numerous abnormal findings not
2 discussed by the ALJ and notes regarding serious psychiatric symptoms including
3 hallucinations, Tr. 304, 324, suicidal ideation, Tr. 303, 319, 331, and self-harm, Tr.
4 358, 384. Plaintiff's mother reported Plaintiff had increased mood lability. Tr.
5 284. Plaintiff was observed as having poor eye contact and allowing her mother to
6 answer questions for her. Tr. 338. Plaintiff had only fair hygiene, was viewed as
7 haughty and sarcastic, fidgety, winced when her mother touched her, had only fair
8 concentration, and poor eye contact. Tr. 348. Plaintiff reported engaging in
9 multiple forms of self-harm at several appointments, which the ALJ did not
10 address anywhere in the decision. Tr. 382, 384, 392, 460. Plaintiff engaged in
11 self-harm by pulling her hair out, resulting in thinning hair Plaintiff showed her
12 provider, followed with Plaintiff shaving her hair off. Tr. 384, 392. Plaintiff also
13 has a history of a suicide attempt, inpatient hospitalization and ongoing suicidal
14 ideation, none of which were addressed by the ALJ. Tr. 303, 319, 331, 345, 351.

15 The ALJ cited to multiple MSEs with normal to mildly abnormal findings,
16 but largely ignored the abnormal observations discussed above, such as poor eye
17 contact, fair concentration and hygiene, and abnormal behavior when engaging in
18 conversations during an appointment. Tr. 22-23. The ALJ found Dr. Ruddell and
19 Dr. Cline's MSEs "unpersuasive," though both MSEs demonstrated significant
20 impairments. Tr. 23 (citing Tr. 254, 324). Dr. Ruddell found Plaintiff was

1 anxious, depressed, restless, labile/tearful, with poor voice quality, impaired recent
2 and immediate memory, impaired executive functioning and problem solving, and
3 inadequate eye contact. Tr. 254. Dr. Cline noted Plaintiff had abnormal abstract
4 thought, insight, judgment, perception and thoughts. Tr. 324.

5 The ALJ must consider all of the relevant evidence in the record and may
6 not point to only those portions of the records that bolster her findings. *See, e.g.,*
7 *Holohan v. Massanari*, 246 F.3d 1195, 1207-08 (9th Cir. 2001) (holding that an
8 ALJ cannot selectively rely on some entries in plaintiff's records while ignoring
9 others). In citing portions of the record that show milder examination findings
10 while the longitudinal record shows more mixed results, and not analyzing
11 significant psychiatric symptoms, the ALJ's characterization of the record is not
12 supported by substantial evidence.

13 3. *Activities of Daily Living*

14 The ALJ found Plaintiff's activities inconsistent with her allegations. Tr. 23.
15 The ALJ may consider a claimant's activities that undermine reported symptoms.
16 *Rollins*, 261 F.3d at 857. If a claimant can spend a substantial part of the day
17 engaged in pursuits involving the performance of exertional or non-exertional
18 functions, the ALJ may find these activities inconsistent with the reported
19 disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*, 674 F.3d at 1113. "While a
20 claimant need not vegetate in a dark room in order to be eligible for benefits, the

1 ALJ may discount a claimant's symptom claims when the claimant reports
2 participation in everyday activities indicating capacities that are transferable to a
3 work setting" or when activities "contradict claims of a totally debilitating
4 impairment." *Molina*, 674 F.3d at 1112-13.

5 The ALJ noted Plaintiff engaged in social activities, worked part-time in a
6 position where she interacted with others for two months, exercised, went out
7 alone, and obtained her driver's license. Tr. 23. The ALJ found these activities
8 were inconsistent with Plaintiff's reported difficulties socializing and going out
9 alone. *Id.* Plaintiff reported some online and in person socializing with friends
10 and family but reported nervousness and difficulty socializing and getting out of
11 the house. Tr. 421. Plaintiff particularly struggled with crowds. Tr. 433. Plaintiff
12 attempted to work part-time for less than two months but was overwhelmed with
13 the work and had increased anxiety when she had to work. Tr. 454. Plaintiff's
14 activities are not clearly inconsistent with her allegations of disabling
15 psychological symptoms, nor is Plaintiff's performance of the activities indicative
16 that her performance would be successfully transferable to a work setting. As
17 such, this was not a clear and convincing reason to reject Plaintiff's statements.

18 4. *Lack of Treatment*

19 The ALJ found Plaintiff's allegations inconsistent with her minimal
20 treatment. Tr. 23-24. Unexplained, or inadequately explained, failure to seek

1 treatment or follow a prescribed course of treatment may serve as a basis to
2 discount the claimant's reported symptoms, unless there is a good reason for the
3 failure. *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). When there is no
4 evidence suggesting that the failure to seek or participate in treatment is
5 attributable to a mental impairment rather than a personal preference, it is
6 reasonable for the ALJ to conclude that the level or frequency of treatment is
7 inconsistent with the alleged severity of complaints. *Molina*, 674 F.3d at 1113-14.
8 But when the evidence suggests lack of mental health treatment is partly due to a
9 claimant's mental health condition, it may be inappropriate to consider a
10 claimant's lack of mental health treatment when evaluating the claimant's failure
11 to participate in treatment. *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996).

12 Here, the ALJ considered Plaintiff's gaps in treatment, including missed
13 appointments, and periods where Plaintiff did not take her psychiatric medication
14 as prescribed. Tr. 22-23. The ALJ found Plaintiff did not offer any reason to
15 justify the inconsistency in her treatment. Tr. 23. However, the ALJ failed to
16 consider the barriers Plaintiff's mental health conditions caused in her accessing
17 and continuing treatment. Dr. Cline opined plaintiff's personality disorder may
18 have played a role in her limited progress in therapy. Tr. 323. Plaintiff reported
19 paranoia leads her to feeling like stopping her medications. Tr. 345. Plaintiff
20 reported forgetting appointments, Tr. 363, having trust issues regarding counselors,

Tr. 215, feeling anxious about having appointments too frequently, Tr. 375, and missing an appointment due to having been engaging in self-harm, *id.* Plaintiff also reported difficulty with accessing transportation for appointments. Tr. 384. As the ALJ did not consider and address Plaintiff's reasons for having inconsistent treatment, this was not a clear and convincing reason to reject Plaintiff's statements.

Because the ALJ failed to provide clear and convincing reason supported by substantial evidence to discredit Plaintiff's symptom testimony, the ALJ is instructed to reconsider Plaintiff's symptom testimony on remand and incorporate the reported limitations into the RFC or give clear and convincing reasons to reject the statements.

B. Medical Opinion Evidence

Plaintiff argues that the ALJ improperly weighed the medical opinions of Alysa Ruddell, Ph.D., Daniel Neims, Psy.D., and R.A. Cline, Psy.D. ECF No. 15 at 7-17.

There are three types of physicians: "(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant [but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan*, 246 F.3d at 1201-02 (citations omitted). Generally, a treating

1 physician's opinion carries more weight than an examining physician's, and an
2 examining physician's opinion carries more weight than a reviewing physician's.
3 *Id.* at 1202. "In addition, the regulations give more weight to opinions that are
4 explained than to those that are not, and to the opinions of specialists concerning
5 matters relating to their specialty over that of nonspecialists." *Id.* (citations
6 omitted).

7 If a treating or examining physician's opinion is uncontradicted, the ALJ
8 may reject it only by offering "clear and convincing reasons that are supported by
9 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
10 "However, the ALJ need not accept the opinion of any physician, including a
11 treating physician, if that opinion is brief, conclusory and inadequately supported
12 by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
13 (9th Cir. 2009) (internal quotation marks and brackets omitted). "If a treating or
14 examining doctor's opinion is contradicted by another doctor's opinion, an ALJ
15 may only reject it by providing specific and legitimate reasons that are supported
16 by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-
17 31). The opinion of a nonexamining physician may serve as substantial evidence if
18 it is supported by other independent evidence in the record. *Andrews v. Shalala*,
19 53 F.3d 1035, 1041 (9th Cir. 1995).

1 *1. Dr. Ruddell*

2 Dr. Ruddell performed a psychological examination on November 10, 2014
3 and diagnosed Plaintiff with anxiety disorder, major depressive disorder, gender
4 identity disorder, and bipolar disorder. Tr. 251-55. Dr. Ruddell opined that
5 Plaintiff had marked symptoms of anhedonia, anxiety and isolation, and severe
6 symptoms of sleep disturbance. Tr. 252. Dr. Ruddell further opined Plaintiff had
7 marked work-related limitations in her abilities to learn new tasks, adapt to
8 changes, communicate/perform effectively, set realistic goals and planning
9 independently, and maintain appropriate behavior; and a severe limitation in her
10 ability to complete a workday/week without interruptions from her symptoms. Tr.
11 253.

12 The ALJ gave Dr. Ruddell's opinion little weight. Tr. 24-25. As Dr.
13 Ruddell's opinion was contradicted by the opinions of James Bailey, Ph.D., Tr. 73-
14 75, and Dan Donahue, Ph.D., Tr.85-87, the ALJ was required to identify specific
15 and legitimate reasons to reject the opinion. *See Bayliss*, 427 F.3d at 1216.

16 First, the ALJ found the opinion is internally inconsistent. Tr. 24. Relevant
17 factors to evaluate any medical opinion include the amount of relevant evidence
18 that supports the opinion, the quality of the explanation provided in the opinion,
19 and the consistency of the medical opinion with the record as a whole.
20 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn*, 495 F.3d at 631.

1 Moreover, a physician's opinion may be rejected if it is unsupported by the
2 physician's treatment notes. *See Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir.
3 2003).

4 Here, the ALJ cited to one alleged inconsistency within the opinion. Tr. 24.

5 The ALJ found Plaintiff's ability to perform a three-step command inconsistent
6 with the opinion Plaintiff would have difficulty with learning new tasks. *Id.*

7 However, while Dr. Ruddell did not indicate Plaintiff had any difficulties with
8 concentration, Plaintiff had an impaired memory. Tr. 254. Plaintiff's ability to
9 recall three words after five minutes and at the end of the interview was impaired,
10 as was her ability to recall a series of digits. *Id.* Without a more meaningful

11 analysis by the ALJ, the Court is unable to determine if the ALJ's decision to reject
12 Dr. Ruddell's opinion on this basis is legitimate, specific, and supported by
13 substantial evidence. *See Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir.
14 2015) (demanding that the ALJ set forth their reasoning in a way that allows for
15 meaningful review); *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

16 Second, the ALJ reasoned the opinion consisted of checked boxes with no
17 explanation. Tr. 24. The fact that an opinion is rendered, in part, in a check box
18 form is not reason alone to reject the opinion. *See Trevizo v. Berryhill*, 871 F.3d
19 664, 677 n.4 (9th Cir. 2017). However, the Social Security regulations "give more
20 weight to opinions that are explained than to those that are not." *Holohan*, 246

1 F.3d at 1202. “[T]he ALJ need not accept the opinion of any physician, including
2 a treating physician, if that opinion is brief, conclusory and inadequately supported
3 by clinical findings.” *Bray*, 554 at 1228.

4 While a portion of Dr. Ruddell’s opinion consists of checkboxes, the
5 checkboxes are accompanied by a clinical interview, mental status examination,
6 assessment, clinical findings, and notes explaining how the symptoms impact
7 Plaintiff’s functioning. Tr. 251-55. Dr. Ruddell opined Plaintiff’s anhedonia
8 causes a marked limitation in her ability to concentrate, attend and focus on work-
9 related tasks. Tr. 252. Dr. Ruddell opined Plaintiff’s anger causes moderate
10 limitations due to causing conflict on the job, a hostile work environment and
11 absenteeism. *Id.* She opined Plaintiff’s anxiety causes marked limitations in
12 Plaintiff’s ability to concentrate on tasks and Plaintiff’s isolation causes marked
13 limitations due to issues including absenteeism. *Id.* Dr. Ruddell also opined
14 Plaintiff’s sleep disturbance causes severe limitations in concentration, and causes
15 difficulties with alertness, fostering accidents and careless mistakes. *Id.* The
16 ALJ’s finding that Dr. Ruddell’s opinion consisted of checkboxes and was not
17 explained is not supported by substantial evidence.

18 Third, the ALJ found Dr. Ruddell did not review any treatment records and
19 thus based her opinion on Plaintiff’s onetime examination. Tr. 25. The extent to
20 which a medical source is “familiar with the other information in [the claimant’s]

case record” is relevant in assessing the weight of that source’s medical opinion. *See* 20 C.F.R. §416.927(c)(6). Additionally, the number of visits a claimant had with a particular provider is a relevant factor in assigning weight to an opinion. 20 C.F.R. § 416.927(c). However, the fact that an evaluator examined Plaintiff one time is not a legally sufficient basis for rejecting the opinion. The regulations direct that all opinions, including the opinions of examining providers, should be considered. 20 C.F.R. § 416.927(b), (c). The Court notes that while it is accurate that Dr. Ruddell did not review any records when forming her opinion, the ALJ’s rationale in rejecting the opinion as based on a onetime examination is inconsistent with the ALJ giving great weight to the opinions of Dr. Bailey and Dr. Donahue, whom did not examine nor treat Plaintiff. Tr. 24-25, 251. As such, this was not a specific and legitimate reason to reject Dr. Ruddell’s opinion.

Fourth, the ALJ further noted Plaintiff’s statements and presentation during Dr. Ruddell’s examination were inconsistent Plaintiff’s treatment records. Tr. 24. Relevant factors when evaluating a medical opinion include the amount of relevant evidence that supports the opinion and the consistency of the medical opinion with the record as a whole. *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at 631. Here, the ALJ cited to records in support of the finding that Plaintiff reported information to Dr. Ruddell that was inconsistent with what she reported to other providers. Tr. 24-25 (citing Tr. 252, 254, 269, 280, 284). As discussed *supra*, the ALJ erred in

1 her consideration of Plaintiff's symptom complaints. In her analysis of the
2 consistency of Plaintiff's reports to Dr. Ruddell and the consistency with other
3 medical records, the ALJ again did not consider all of the relevant evidence. This
4 reason is not supported by substantial evidence in the record.

5 Fifth, the ALJ reasoned Dr. Ruddell's opinion was inconsistent with the
6 record as a whole, including minimal observations of psychiatric symptoms,
7 Plaintiff's mental status examination performance, and Plaintiff's activities. Tr.
8 25. An ALJ may discredit physicians' opinions that are unsupported by the record
9 as a whole. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir.
10 2004). However, an ALJ must consider all of the relevant evidence in the record
11 and may not point to only those portions of the records that bolster her findings.
12 *See, e.g., Holohan*, 246 F.3d at 1207-08 (holding that an ALJ cannot selectively
13 rely on some entries in plaintiff's records while ignoring others). The ALJ is not
14 permitted to "cherry pick" from mixed evidence to support a denial of benefits.
15 *Garrison*, 759 F.3d at 1017 n.23.

16 As discussed *supra*, the ALJ cited portions of the record to support
17 individual points while ignoring the rest of the abnormal findings within the record
18 (e.g., citing to a record where Plaintiff did not report hallucinations to support the
19 contention Plaintiff did not report hallucinations to others, while ignoring the
20 references in the same record to Plaintiff's reports of self-harm, irritability, anger

1 and panic attacks). *See* Tr. 25 (citing Tr. 269). The longitudinal record shows
2 Plaintiff had generally abnormal mental status examinations and observations of
3 psychological symptoms. Tr. 254, 323, 348, 368-69, 386-87, 396-97, 423.

4 While the ALJ offered additional reasons to reject Dr. Ruddell's opinion, the
5 Court finds the ALJ erred in her consideration of the opinion given the multiple
6 errors addressed *supra*. The ALJ found Plaintiff has only moderate limitations and
7 is capable of sustaining a full-time workweek, Tr. 19-20, contrary to Dr. Ruddell's
8 opinion, Tr. 253. As such, the ALJ's rejection of Dr. Ruddell's opinion was not
9 harmless. *See Molina*, 674 F.3d at 1111. Defendant argues the error was harmless
10 as Dr. Ruddell's opinion was rendered prior to the alleged onset date. ECF No. 16
11 at 14. However, the opinion was given less than four months prior to the amended
12 onset date, and the ALJ did not address the timing of the opinion; as such, the
13 Court will not consider this post-hoc rationalization. *See Pinto v. Massanari*, 249
14 F.3d 840, 847-48 (9th Cir. 2001).

15 *2. Dr. Neims*

16 Dr. Neims reviewed Dr. Ruddell's opinion and found the evaluation
17 supported Dr. Ruddell's opinion regarding Plaintiff's limitations and the duration
18 of impairment. Tr. 446-47. Dr. Neims found the January 1, 2014 alleged onset
19 date was not supported by the evidence, but the November 10, 2014 date was more
20 appropriate, given the evidence from the evaluation on that date. Tr. 447.

1 The ALJ gave Dr. Neims' opinion little weight. Tr. 25. As Dr. Neims'
2 opinion was based exclusively on Dr. Ruddell's evaluation and opinion, the ALJ
3 rejected the opinion for the same reasons she rejected Dr. Ruddell's opinion. *Id.*
4 As the ALJ's rejection of Dr. Ruddell's opinion was erroneous, and the ALJ gave
5 no additional analysis in rejecting Dr. Neims' opinion, the Court is unable to
6 determine if the ALJ's decision to reject Dr. Neims' opinion is legitimate, specific,
7 and supported by substantial evidence. *See Brown-Hunter*, 806 F.3d at 492
8 (demanding that the ALJ set forth its reasoning in a way that allows for meaningful
9 review); *Embrey*, 849 F.2d at 421-22. This opinion must be reconsidered on
10 remand.

11 *3. Dr. Cline*

12 Dr. Cline examined Plaintiff on September 27, 2016 and diagnosed Plaintiff
13 with dysthymic disorder, major depressive disorder, PTSD, generalized anxiety
14 disorder, a provisional diagnosis of borderline personality disorder, and marijuana
15 use disorder, and provided an opinion on Plaintiff's functioning. Tr. 319-324. Dr.
16 Cline opined Plaintiff had marked limitations in performing work within a
17 schedule and maintaining attendance, communicating and performing work
18 effectively and completing a normal workday/workweek. Tr. 322.

19 The ALJ gave Dr. Cline's opinion little weight. Tr. 25. As the examining
20 source's opinion was contradicted by the opinions of James Bailey, Ph.D., Tr. 73-

75, and Dan Donahue, Ph.D., Tr.85-87, the ALJ was required to give specific and legitimate reasons to reject the opinion. *See Bayliss*, 427 F.3d at 1216.

First, the ALJ reasoned Dr. Cline based her opinion on Plaintiff's self-report, which the ALJ found inconsistent with the other evidence. Tr. 25. An ALJ may consider the consistency of an individual's own statements made in connection with the disability-review process with any other existing statements or conduct. *Smolen*, 80 F.3d at 1284. As discussed *supra*, the ALJ erred in her consideration of Plaintiff's symptom complaints.

Second, the ALJ reasoned Dr. Cline's opinion was temporary, as she stated the limitations would last between nine and 12 months. Tr. 25. Temporary limitations are not enough to meet the durational requirement for a finding of disability. 20 C.F.R. § 416.905(a) (requiring a claimant's impairment to be expected to last for a continuous period of not less than twelve months); 42 U.S.C. § 423(d)(1)(A) (same); *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008) (affirming the ALJ's finding that treating physicians' short-term excuse from work was not indicative of "claimant's long-term functioning"). Defendant concedes that Dr. Cline's opinion states that the limitations would last up to 12 months, which meets the durational requirements. ECF No. 16 at 17. As such, this was not a legitimate reason to reject Dr. Cline's opinion. Defendant argues the error was harmless as the ALJ gave other specific and legitimate reasons

1 for rejecting Dr. Cline's opinion, however, as discussed herein, the other reasons
2 were also erroneous and as such this error was harmful.

3 Next, the ALJ found Dr. Cline's opinion is inconsistent with the record as a
4 whole, including minimal observations of psychiatric symptoms, Plaintiff's mental
5 status examinations and Plaintiff's activities. Tr. 25. As discussed *supra*, the
6 ALJ's analysis of the record is incomplete and not supported by substantial
7 evidence. Although the ALJ identified additional reasons for rejecting Dr. Cline's
8 opinion, the Court finds the ALJ erred in her consideration of Dr. Cline's opinion
9 for the reasons discussed herein.

10 In summary, the ALJ erred by discounting the opinions of Dr. Ruddell, Dr.
11 Neims, and Dr. Cline without providing specific and legitimate reasons for
12 rejecting the opinions. These errors were harmful, because if the opinions were
13 credited, the ALJ would be required to add the supported limitations to the RFC
14 and reassess whether Plaintiff is capable of performing sustained gainful work.
15 *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008). The ALJ is
16 instructed to reconsider the medical opinion evidence on remand and incorporate
17 the limitations into the RFC or give specific and legitimate reasons, supported by
18 substantial evidence, to reject the opinions.

C. Step-Two Analysis

Plaintiff contends the ALJ erred at step two by failing to identify her digestive issues and borderline personality disorder as severe impairments. ECF No. 15 at 3-7. At step two of the sequential process, the ALJ must determine whether claimant suffers from a “severe” impairment, i.e., one that significantly limits her physical or mental ability to do basic work activities. 20 C.F.R. § 416.920(c).

To establish a severe impairment, the claimant must first prove the existence of a physical or mental impairment by providing medical evidence consisting of signs, symptoms, and laboratory findings; the claimant’s own statement of symptoms alone will not suffice. 20 C.F.R. § 416.921. In other words, the claimant must establish the existence of the physical or mental impairment through objective medical evidence (*i.e.*, signs, laboratory findings, or both) from an acceptable medical source; the medical impairment cannot be established by the claimant’s statement of symptoms, a diagnosis, or a medical opinion. *Id.*

An impairment may be found to be not severe when “medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual’s ability to work....” Social Security Ruling (SSR) 85-28 at *3. Similarly, an impairment is not severe if it does not significantly limit a claimant’s physical or mental ability to

1 do basic work activities; which include walking, standing, sitting, lifting, pushing,
2 pulling, reaching, carrying, or handling; seeing, hearing, and speaking;
3 understanding, carrying out and remembering simple instructions; responding
4 appropriately to supervision, coworkers and usual work situations; and dealing
5 with changes in a routine work setting. 20 C.F.R. § 416.922(a); SSR 85-28.³

6 Step two is “a de minimus screening device [used] to dispose of groundless
7 claims.” *Smolen*, 80 F.3d at 1290. “Thus, applying our normal standard of review
8 to the requirements of step two, [the Court] must determine whether the ALJ had
9 substantial evidence to find that the medical evidence clearly established that
10 [Plaintiff] did not have a medically severe impairment or combination of
11 impairments.” *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005).

12 At step two, the ALJ considered the record concerning the challenged
13 impairments, but concluded these conditions were non-severe as they did not more
14 than minimally impact Plaintiff’s ability to perform basic work activities or were
15 not medically determinable. Tr. 18.

18
19 ³ The Supreme Court upheld the validity of the Commissioner’s severity
20 regulation, as clarified in SSR 85-28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-54
(1987).

1 *1. Digestive issues*

2 The ALJ found that the record did not support a finding that Plaintiff's
3 anorexia is a medically determinable impairment. *Id.* Additionally, the ALJ
4 determined that Plaintiff's other physical symptoms/conditions did not last for a
5 continuous period of twelve months or did not cause significant limitations in
6 functioning. *Id.*

7 The records demonstrate that Plaintiff experienced digestive symptoms
8 during the relevant adjudicative period and that her BMI decreased over time. In
9 2015, Plaintiff weighed 137.5 pounds, without a calculated BMI. Tr. 314. By
10 October 2016, her weight dropped to 129 pounds. Tr. 412. In April 2017, her
11 BMI was 17.05, Tr. 328, and in October 2017, Plaintiff's BMI was 16.78, Tr. 449.

12 In November 2014, Plaintiff reported constipation for "quite a while." Tr.
13 251. In February 2015, Plaintiff and her mother reported Plaintiff will not eat for
14 days and will then overeat to the point of feeling ill. Tr. 264. In June 2015, again
15 Plaintiff reported she goes days without eating. Tr. 207. In May 2016, Plaintiff
16 reported she had experienced nausea for several months, and Dr. Lindgren assessed
17 her with poor appetite and anorexia. Tr. 330-32. Dr. Lindgren coded the anorexia
18 assessment with an international classification of diseases (ICD) label of "R63",
19 indicating anorexia meaning loss of appetite and not a diagnosis of anorexia
20 nervosa. *See* ICD-10-CM, available at:

1 <https://www.icd10data.com/ICD10CM/Codes/F01-F99/F50-F59/F50-#F50.0> (last
2 accessed June 24, 2020). Dr. Lindgren observed Plaintiff appeared under-
3 nourished. Tr. 331.

4 In September 2016, Plaintiff reported she had been experiencing a
5 “nonexistent” appetite for months. Tr. 319. In July 2017, Plaintiff reported her
6 diarrhea had been more frequent. Tr. 368. In May 2017, Plaintiff complained of
7 diarrhea. Tr. 325-26. In October 2017, Plaintiff reported right upper quadrant
8 pain, nausea and diarrhea, and reported the symptoms were worse with eating. Tr.
9 448-49. Plaintiff’s abdomen was tender to palpation and Dr. Lindgren diagnosed
10 right upper quadrant pain. Tr. 449. Dr. Lindgren suspected cholecystitis and
11 recommended an ultrasound but there are no follow-up records. *Id.*

12 At the April 2018 hearing, Plaintiff was not asked about any physical
13 limitations nor her current weight. Tr. 49-59. While Plaintiff’s function report
14 focused on mental health symptoms, she reported lacking strength and energy to
15 complete tasks. Tr. 168-71. She also reported only being able to walk half a mile
16 before needing to rest for 10 minutes. Tr. 173. As the case is being remanded to
17 reconsider Plaintiff’s symptom complaints and the medical opinion evidence, the
18 ALJ is also instructed to perform the five-step analysis anew, including
19 reconsidering if Plaintiff has a severe physical impairment at step two.
20

1 2. *Personality disorder*

2 The ALJ found Plaintiff's major depressive disorder, gender identity
3 disorder, generalized anxiety disorder, posttraumatic stress disorder and dysthymic
4 disorder to be severe impairments. Tr. 17. The ALJ stated that there were other
5 psychiatric diagnoses in the record, and the "decision addresses all the limitations
6 that the claimant has alleged or has been opined, no matter the diagnostic label."
7 Tr. 18. The ALJ did not specifically address the borderline personality disorder
8 diagnosis. When an ALJ fails to properly consider a diagnosis and that lack of
9 consideration leads to the ALJ crafting an RFC that is incomplete, flawed and not
10 supported by substantial evidence in the record, the ALJ has erred at step two. *See*
11 *Hill*, 698 F.3d at 1161.

12 Dr. Cline found Plaintiff met the diagnostic criteria for borderline
13 personality disorder and gave a provisional diagnosis of borderline personality
14 disorder in October 2016. Tr. 319-20, 323. Dr. Robinson diagnosed Plaintiff with
15 borderline personality disorder in July 2017, Tr. 369, after counselor Ms. Ellis
16 found Plaintiff met the criteria for borderline personality disorder and staffed her
17 case with a doctor, Tr. 392. At the appointment with Ms. Ellis, Plaintiff reported
18 feeling like an "angry arrogant child" and reported punching herself in the face and
19 pulling her own hair out on a monthly basis. *Id.* Plaintiff cried while showing Ms.
20 Ellis several bald spots. *Id.* Ms. Ellis found Plaintiff met eight of the nine

1 borderline personality disorder criteria, and only five are required for a diagnosis.

2 *Id.*

3 The diagnostic criteria for borderline personality disorder include intense,
4 inappropriate or uncontrollable anger, self-harming behavior/thoughts, unstable
5 relationships and impulsive behaviors. DIAGNOSTIC AND STATISTICAL MANUAL OF
6 MENTAL DISORDERS, 5th Ed. at 664 (2013). Treatment of borderline personality
7 disorder is often complicated “by the fact that the characteristics that define a
8 personality disorder may not be considered problematic by the individual.” *Id.* at
9 647.

10 Throughout the record, Plaintiff demonstrated abnormal social behavior at
11 appointments. She spent some appointments tearful through the appointment. Tr.
12 392. She was observed as disheveled, withdrawn, depressed and anxious, with
13 monotone one-word answers. Tr. 328. She has been viewed as having a flat
14 affect, being shy with poor eye contact. Tr. 338. At an exam, Plaintiff was
15 anxious and depressed, with poor voice quality, she avoided eye contact, played
16 with her phone case and broke into tears at the end of the exam. Tr. 254. At
17 another exam, Plaintiff had quiet speech, poor eye contact, flattened and
18 withdrawn affect, and multiple abnormalities on exam. Tr. 324. She has
19 repeatedly reported minimal social activities and difficulty interacting with others,

Tr. 58, 171, 252, 319, 411, 421, though she reported medication made her a “little” more comfortable socially, Tr. 406.

Plaintiff has also engaged in self-injurious behavior and reported thoughts of suicide and self-harm. Plaintiff reported recent cutting in 2015, 2016, 2017 and 2018. Tr. 263, 324, 345, 395, 400, 454, 460. She has also reported punching herself and pulling out her hair. Tr. 392, 460. She has reported thoughts of self-harm and suicidal ideation in 2015, 2016 and 2017. Tr. 206, 264, 324, 345, 351, 358, 364, 411, 438, 460.

Plaintiff argues that the ALJ failed to consider the unique aspects of Plaintiff’s personality disorder, including her difficulty maintaining stable relationships, her impulsive behavior and self-harm. ECF No. 15 at 6-7. As the case is being remanded to reconsider the medical opinion evidence and Plaintiff’s symptom claims, and Plaintiff has presented evidence of her borderline personality disorder, the ALJ is instructed to reconsider whether Plaintiff’s personality disorder is a severe impairment, and whether the impairment causes any additional limitations that must be accounted for in the RFC.

D. Step-Three Analysis

Plaintiff contends that the ALJ erred by finding that Plaintiff’s digestive issues did not meet or equal Listing 5.08. ECF No. 15 at 5-6. At step three, the

1 ALJ must determine if a claimant's impairments meet or equal a listed impairment.
2 20 C.F.R. § 416.920(a)(4)(iii). The Listing of Impairments "describes each of the
3 major body systems impairments [which are considered] severe enough to prevent
4 an individual from doing any gainful activity, regardless of his or her age,
5 education or work experience." 20 C.F.R. § 416.925. "Listed impairments are
6 purposefully set at a high level of severity because 'the listings were designed to
7 operate as a presumption of disability that makes further inquiry unnecessary.' "
8 *Kennedy v. Colvin*, 758 F.3d 1172, 1176 (9th Cir. 2013) (citing *Sullivan v. Zebley*,
9 493 U.S. 521, 532 (1990)). "Listed impairments set such strict standards because
10 they automatically end the five-step inquiry, before residual functional capacity is
11 even considered." *Kennedy*, 758 F.3d at 1176. If a claimant meets the listed
12 criteria for disability, he will be found to be disabled. 20 C.F.R. §
13 416.920(a)(4)(iii).

14 "To *meet* a listed impairment, a claimant must establish that he or she meets
15 each characteristic of a listed impairment relevant to his or her claim." *Tackett*,
16 180 F.3d at 1099 (emphasis in original); 20 C.F.R. § 416.925(d). "To *equal* a
17 listed impairment, a claimant must establish symptoms, signs and laboratory
18 findings 'at least equal in severity and duration' to the characteristics of a relevant
19 listed impairment" *Tackett*, 180 F.3d at 1099 (emphasis in original) (quoting
20 20 C.F.R. § 404.1526(a)); 20 C.F.R. § 416.926(a). "If a claimant suffers from

1 multiple impairments and none of them individually meets or equals a listed
2 impairment, the collective symptoms, signs and laboratory findings of all of the
3 claimant's impairments will be evaluated to determine whether they meet or equal
4 the characteristics of any relevant listed impairment." *Tackett*, 180 F.3d at 1099.
5 However, " '[m]edical equivalence must be based on medical findings,' and "[a]
6 generalized assertion of functional problems is not enough to establish disability at
7 step three.' " *Id.* at 1100 (quoting 20 C.F.R. § 404.1526(a)); 20 C.F.R. §
8 416.926(a).

9 The claimant bears the burden of establishing his impairment (or
10 combination of impairments) meets or equals the criteria of a listed impairments.
11 *Burch*, 400 F.3d at 683. "An adjudicator's articulation of the reason(s) why the
12 individual is or is not disabled at a later step in the sequential evaluation process
13 will provide rationale that is sufficient for a subsequent reviewer or court to
14 determine the basis for the finding about medical equivalence at step 3." Social
15 Security Ruling (SSR) 17-2P, 2017 WL 3928306, at *4 (effective March 27,
16 2017).

17 Here, the ALJ found that Plaintiff's impairments and combinations of
18 impairments did not meet or equal any listings. Tr. 18-20. The ALJ considered
19 listings 12.04, 12.06 and 12.08 but did not consider any other listings including
20 Listing 5.08. Tr. 19. Listing 5.08 is met when a Plaintiff demonstrates "weight

1 loss due to any digestive disorder despite continuing treatment as prescribed, with
2 BMI of less than 17.50 calculated on at least two evaluations at least 60 days apart
3 within a consecutive 6-month period.” 20 C.F.R. Part 404, Subpart P, Appendix 1.

4 A review of the evidence shows that Plaintiff’s BMI was below 17.50 at
5 least sixty days apart and within a six-month period. On April 26, 2017, her BMI
6 was 17.05, Tr. 328, and on October 6, 2017, her BMI was 16.78, Tr. 449. While
7 Plaintiff’s BMI was previously higher, there is at least a sixth-month period where
8 Plaintiff maintained a BMI under 17.5. *See, e.g.*, Tr. 331 (BMI 18.59).

9 As the case is being remanded to reconsider the medical opinion evidence
10 and Plaintiff’s symptom claims, and Plaintiff has presented evidence that her
11 impairments may be of equal severity to Listing 5.08, the ALJ is instructed to
12 reconsider whether Plaintiff’s impairments meet or equal any listings, including
13 Listing 5.08. The ALJ is further instructed to call a medical expert and a
14 psychological expert to assist in determining if Plaintiff’s impairments meet or
15 equal a listing, and if not, what limitations Plaintiff’s impairments cause.

16 **E. Remedy**

17 Plaintiff urges this Court to remand for an immediate award of benefits.
18 ECF No. 15 at 2, 6, 12.

19 “The decision whether to remand a case for additional evidence, or simply to
20 award benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d

1 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)).
2 When the Court reverses an ALJ's decision for error, the Court "ordinarily must
3 remand to the agency for further proceedings." *Leon v. Berryhill*, 880 F.3d 1041,
4 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) ("the
5 proper course, except in rare circumstances, is to remand to the agency for
6 additional investigation or explanation"); *Treichler v. Comm'r of Soc. Sec. Admin.*,
7 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social Security
8 cases, the Ninth Circuit has "stated or implied that it would be an abuse of
9 discretion for a district court not to remand for an award of benefits" when three
10 conditions are met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the
11 credit-as-true rule, where (1) the record has been fully developed and further
12 administrative proceedings would serve no useful purpose; (2) the ALJ has failed
13 to provide legally sufficient reasons for rejecting evidence, whether claimant
14 testimony or medical opinion; and (3) if the improperly discredited evidence were
15 credited as true, the ALJ would be required to find the claimant disabled on
16 remand, the Court will remand for an award of benefits. *Revels v. Berryhill*, 874
17 F.3d 648, 668 (9th Cir. 2017). Even where the three prongs have been satisfied,
18 the Court will not remand for immediate payment of benefits if "the record as a
19
20

1 whole creates serious doubt that a claimant is, in fact, disabled.” *Garrison*, 759
2 F.3d at 1021.

3 While Plaintiff argues immediate benefits are appropriate because she meets
4 or equals Listing 5.08, Plaintiff has not demonstrated her weight loss is due to a
5 digestive disorder, and she did not present an argument as to how she equals
6 Listing 5.08. Plaintiff further urges remand for immediate benefits based on
7 crediting the medical opinions, however, further proceedings are necessary to
8 resolve conflicts in the medical opinion evidence and to take medical expert
9 testimony. As such, the case is remanded for proceedings consistent with this
10 Order.

11 CONCLUSION

12 Having reviewed the record and the ALJ’s findings, the Court concludes the
13 ALJ’s decision is not supported by substantial evidence and is not free of harmful
14 legal error. Accordingly, **IT IS HEREBY ORDERED:**

15 1. The District Court Executive is directed to substitute Andrew M. Saul as
16 the Defendant and update the docket sheet.

17 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**.

18 3. Defendant’s Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.

19 4. The Clerk’s Office shall enter **JUDGMENT** in favor of Plaintiff
20 **REVERSING** and **REMANDING** the matter to the Commissioner of Social

1 Security for further proceedings consistent with this recommendation pursuant to
2 sentence four of 42 U.S.C. § 405(g).

3 The District Court Executive is directed to file this Order, provide copies to
4 counsel, and **CLOSE THE FILE**.

5 DATED June 24, 2020.

6 s/Mary K. Dimke
7 MARY K. DIMKE
8 UNITED STATES MAGISTRATE JUDGE
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